

JUL 29 1942

CHARLES ELMORE GROPLEY  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1942.

No. 262-264

STROBEL STEEL CONSTRUCTION COMPANY,  
a corporation,  
*Petitioner and Appellant below,*

*vs.*

STATE HIGHWAY COMMISSIONER OF THE  
STATE OF NEW JERSEY,  
*Respondent and Appellee below.*

---

---

**PETITION FOR WRIT OF CERTIORARI TO THE  
NEW JERSEY COURT OF ERRORS AND APPEALS,  
AND BRIEF IN SUPPORT THEREOF.**

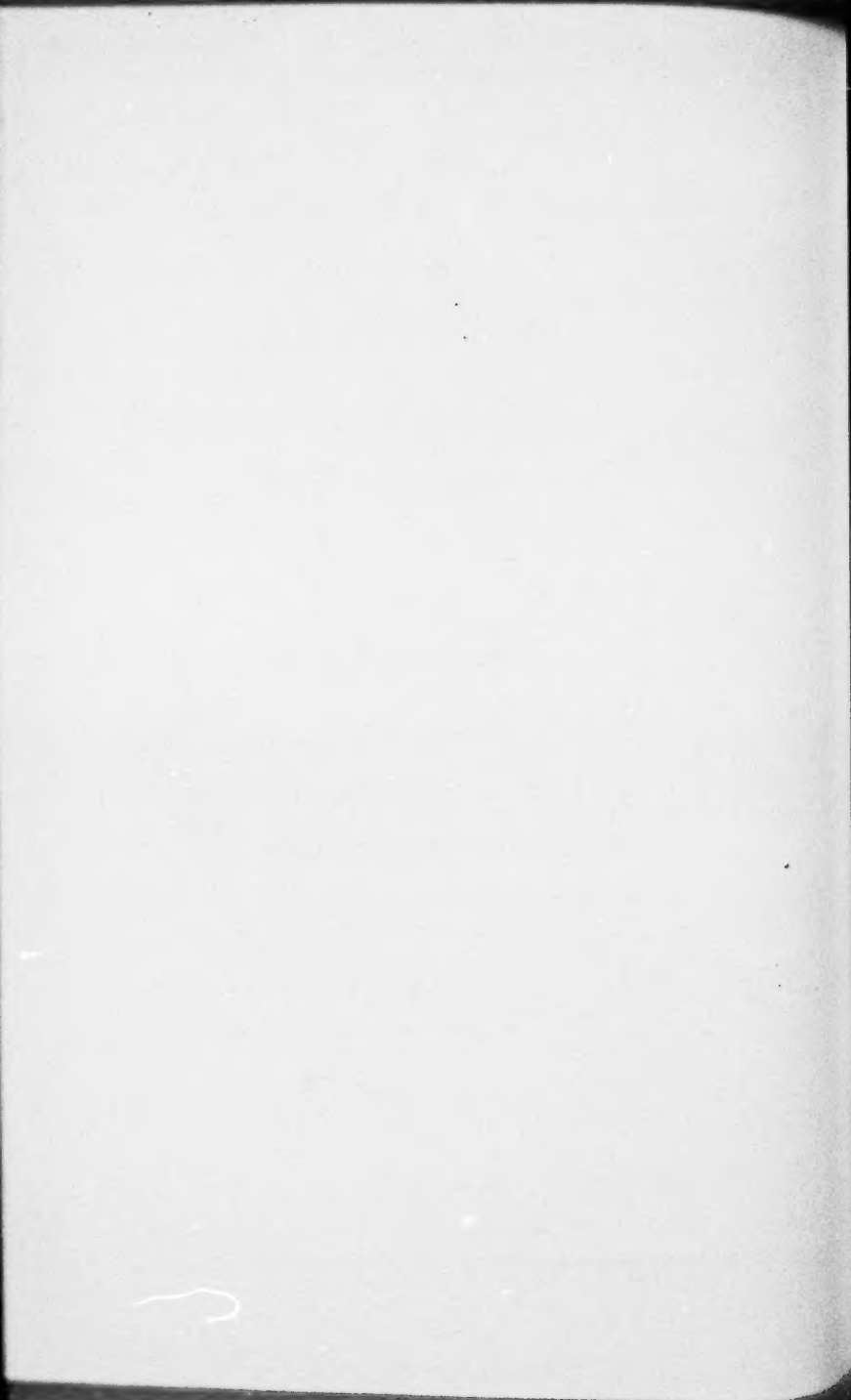
---

---

LIONEL P. KRISTELLER,  
SAUL J. ZUCKER,

*Attorneys for and of Counsel with  
Petitioner,*

744 Broad Street,  
Newark, New Jersey.



# INDEX.

---

	PAGE
PETITION :	
I. Summary Statement of the Matter Involved.	2
II. Jurisdiction .....	5
III. The Questions Presented .....	6
IV. Reasons Relied Upon for the Allowance of the Writ .....	6
BRIEF :	
I. Opinions of the Courts Below.....	8
II. Jurisdiction .....	9
III. Statement of the Case.....	9
IV. Specification of Errors .....	10
V. Argument and Summary .....	10
POINT I. ....	11
CONCLUSION .....	16

## CASES CITED.

<i>Federal Land Bank vs. Priddy</i> , 295 U. S. 295.....	16
<i>Federal Housing Administration vs. Burr</i> , 309 U. S. 242 .....	16
<i>Keifer vs. Reconstruction Finance Corp</i> , 306 U. S. 381 .....	16
<i>Reconstruction Finance Corp. vs. Menihan</i> , 312 U. S. 81 .....	16

## NEW JERSEY STATUTES.

Pamphlet Laws of 1917, Chapter 15.....	14
Pamphlet Laws of 1927, Chapter 319, Section 106...	12, 13
Pamphlet Laws of 1927, Chapter 331.....	14
Pamphlet Laws of 1929, Chapter 221, Section 111...	12



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1942.

\_\_\_\_\_  
No. \_\_\_\_\_ .  
\_\_\_\_\_

STROBEL STEEL CONSTRUCTION COMPANY,  
a corporation,  
Petitioner and Appellant below,

*vs.*

STATE HIGHWAY COMMISSIONER OF THE STATE OF  
NEW JERSEY,  
Respondent and Appellee below.

\_\_\_\_\_  
**PETITION FOR WRIT OF CERTIORARI TO THE  
NEW JERSEY COURT OF ERRORS AND APPEALS.**

*To the Honorable the Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

Your petitioner, Strobel Steel Construction Company,  
a corporation organized under the laws of Illinois and  
licensed to transact business in New Jersey, respectfully  
shows:

## I.

**Summary statement of the matter involved.**

The within application for a writ of certiorari is prosecuted to review a judgment of the New Jersey Court of Errors and Appeals (the highest court of the State of New Jersey) entered April 30, 1942 affirming (a) a judgment of the New Jersey Supreme Court entered January 6, 1941 dismissing an alternative writ of *mandamus* directed to the State Highway Commissioner; and (b) the denial by the State Supreme Court of an application for certiorari to review the action of the State Highway Commissioner.

The basis of the judgment in the State courts throughout has been predicated upon the fact that both the State Highway Commissioner and his predecessor, the State Highway Commission, are adjuncts of the State of New Jersey, and are immune from suit without the consent of the State. The basis of the review sought here is that both the State Highway Commissioner, and his predecessor, the State Highway Commission, were authorized under the New Jersey statutes creating both offices to enter into contracts in the name of the State of New Jersey *or as independent contractors*, and, as petitioner claims, were entitled to sue and subject to be sued.

In order to appreciate the legal questions involved herein, the background will have to be inquired into somewhat in detail.

On July 10, 1929, petitioner and the New Jersey State Highway Commission (the agency then in complete charge

of State highways in the State of New Jersey) entered into a written contract for the erection of a steel bridge on New Jersey State Highway Route Number 10 running between Newark, New Jersey and New York City over the Hackensack River at Jersey City (R. 109). The bridge was a replacement of a bridge that had theretofore existed for many years.

The formal contract was based upon the plans and specifications on file in the Commissioner's office in Trenton which provided the basis for fixing the cost of such work and any extras that might be involved therein.

In due time the work was completed and a dispute arose as to the amount of extras to which petitioner claimed to be entitled. It sought relief with the then State Highway Commission, and later with the successor of that agency, the State Highway Commissioner. Petitioner claimed that it was entitled to \$780,327.22. The State Highway Commission and its successor, the State Highway Commissioner, conceded only \$8,520.48. The unusually large discrepancy created the basis for the litigation which ensued.

Petitioner first sued the State Highway Commission and the State Highway Commissioner in the common law courts of New Jersey on contract. The dismissal of the complaint on the ground that the defendants were immune from suit because of their sovereign characteristics was affirmed by the New Jersey Court of Errors and Appeals. 120 N. J. L. 298; 198 Atl. 774.

Petitioner then brought a proceeding in *Mandamus* to compel the then State Highway Commissioner (who had succeeded the former Commission) to pass upon its claims, and an alternative Writ was allowed for the purpose of

perfecting a record leading to a judgment which would be subject to an appeal to the Court of Errors and Appeal (R. 108).

While this proceeding was pending the then Commissioner purported to pass upon petitioner's claims, and (we assert, arbitrarily) without any hearing whatever adopted the amount of \$8,520.48 as the balance due upon petitioner's contract (R. 151, Par. 120).

Upon the Commissioner making this determination an application was made to the New Jersey Supreme Court for a Writ of Certiorari to review said action by the Commissioner. This application was denied by the Court, upon the ground that the State Highway Commissioner was the *alter ego* of the State and immune from any suit without its consent. 125 N. J. L. 622; 18 Atl. (2) 28.

In the meantime the State Highway Commissioner filed a demurrer to the Alternative Writ of *Mandamus*, which was sustained and the Writ dismissed.

Petitioner appealed to the New Jersey Court of Errors and Appeals from both the dismissal of the Alternative Writ of *Mandamus* and the denial of petitioner's application for a Writ of Certiorari, and the action of the New Jersey Supreme Court in both cases was sustained upon the ground of immunity from suit without the consent of the State. 128 N. J. L. 379; 25 Atl. (2) 903.

It is from these rulings of the highest Court of the State of New Jersey—the New Jersey Court of Errors and Appeals—that petitioner is applying to this Court for relief.



## II.

**Jurisdiction.**

1. The date of the judgment of the New Jersey Court of Errors and Appeals to be reviewed is April 30, 1942. The within application is made within three months after the entry of such judgment.

2. The jurisdiction of this court to issue the writ of certiorari herein prayed for is invoked under Judicial Code, Section 237 (b) as amended by the Act of February 13, 1925, 43 Statutes 938 (Title 28 U. S. C. Section 344).

3. *Petitioner claims* that under and by virtue of the Fourteenth Amendment to the Constitution of the United States of America it has been deprived of its constitutional rights in that the State of New Jersey deprived petitioner of its property without due process of law.

*Respondent asserts* that the State Highway Commission and its successor, the State Highway Commissioner, are adjuncts of the State of New Jersey and are immune from suit without its consent.

4. Petitions for writs of certiorari to review decisions in the highest courts of the various states which were violative of the Fourteenth Amendments to the Federal Constitution have heretofore been granted by this court.

## III.

**The questions presented.**

1. Do the powers conferred upon a state body in the statute creating the body, such as authority to do its work *either as an independent contractor* or employer or through contracts made in the name of the State, confer upon the state body when it enters into a contract, *as an independent contractor* the right and responsibility of suing and being sued?

2. Is the decision of the highest Court of the State sustaining immunity from suit under such circumstances violative of petitioner's rights under the Fourteenth Amendment to the Constitution of the United States, and contrary to the opinion of this Court in *Keifer vs. Reconstruction Finance Corp.*, (306 U. S. 381)?

## IV.

**Reasons relied upon for the allowance of the writ.**

1. The decision of the New Jersey Court of Errors and Appeals in sustaining the immunity from suit of the State Highway Commission and its successor, the State Highway Commissioner, without the consent of the State of New Jersey first obtained is violative of rights guaranteed to petitioner under the Fourteenth Amendment to the Constitution of the United States of America.

2. The decision of the New Jersey Court of Errors and Appeals in sustaining immunity from suit of the State Highway Commission and its successor, the State Highway Commissioner, is in conflict with applicable decisions of this Court (*Keifer vs. Reconstruction Finance Corp.*, 306 U. S. 381, *Reconstruction Finance Corp. vs. Menihan*, 312 U. S. 81).

3. The issue of state's immunity under similar conditions existing throughout the country is one of national importance. It can arise in every state which has highway or other commissions in which immunity from suit has not been particularly reserved by the state legislature. This issue does not appear to have been squarely presented to or decided by this Court.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the New Jersey Court of Errors and Appeals, commanding that Court to certify and to send to this Court, for its review and determination, on a day certain to be named therein, a transcript of the record and proceedings herein; and that the judgment of the New Jersey Court of Errors and Appeals be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem just and meet.

Dated: July 25, 1942.

LIONEL P. KRISTELLER,  
SAUL J. ZUCKER,  
Attorneys for and of Counsel  
with Petitioner.

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1942.

\_\_\_\_\_  
No. \_\_\_\_\_  
\_\_\_\_\_

STROBEL STEEL CONSTRUCTION COMPANY,  
a corporation,  
Petitioner and Appellant below,  
  
*vs.*

STATE HIGHWAY COMMISSIONER OF THE STATE OF  
NEW JERSEY,  
Respondent and Appellee below.

\_\_\_\_\_  
**BRIEF IN SUPPORT OF PETITION FOR WRIT  
OF CERTIORARI.**

(Italics ours, except where otherwise stated.)

**I.**

**Opinions of the Courts Below.**

The opinion of the New Jersey Court of Errors and Appeals sustaining the dismissal of the common law action for extras under the contract is reported in 120 N. J. L. 298; 198 Atlantic 774.

The opinion of the New Jersey Supreme Court denying the application for the writ of certiorari to review the action of the State Highway Commissioner in refusing to allow petitioner's claim for extras is reported in 125 N. J. L. 622; 18 Atl. (2) 28.

The opinion of the New Jersey Court of Errors and Appeals affirming the action of the Supreme Court in dismissing the application for certiorari in the New Jersey Supreme Court, and sustaining said Court in its dismissal (on demurrer) of the alternative writ of *mandamus* directed to the State Highway Commissioner is reported in 128 N. J. L. 379; 25 Atl. (2) 903.

## II.

### Jurisdiction.

A concise statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment in question, has been given under Heading II in the petition, and in the interest of brevity will not be repeated in the brief.

## III.

### Statement of the Case.

A concise statement of the case containing all that is material to the consideration of the questions presented, has been given under Heading I of the petition, and in the interest of brevity will not be repeated in the brief.

## IV.

### **Specification of Errors.**

The specification of errors is substantially the same as the reasons for the allowance of the writ as set forth under Heading IV of the petition, and in the interest of brevity will not be repeated in the brief.

## V.

### **Argument.**

#### **Summary of the Argument.**

Point 1—The insistence by all of the Courts of the State of New Jersey that the State Highway Commission and its successor, the State Highway Commissioner, are immune from suit without the consent of the State of New Jersey is a deprivation of petitioner's rights guaranteed to it under the Fourteenth Amendment of the Constitution of the United States of America, since the Statutes creating the State Highway Commission and the office of State Highway Commissioner authorized the Commission and Commissioner to enter into contracts in the performance of their work *as independent contractors* or in the name of the State of New Jersey, and since under said statutes the powers conferred upon the Commission and Commissioner are to be liberally construed, which naturally implies a liberal construction of correlative liability to suit.

## POINT I.

The insistence by all of the Courts of the State of New Jersey that the State Highway Commission and its successor, the State Highway Commissioner, are immune from suit without the consent of the State of New Jersey is a deprivation of petitioner's rights guaranteed to it under the Fourteenth Amendments of the Constitution of the United States of America, since the statutes creating the State Highway Commission and the office of State Highway Commissioner authorized the Commission and Commissioner to enter into contracts in the performance of their work as independent contractors or in the name of the State of New Jersey, and since under said statutes the powers conferred upon the Commission and Commissioner are to be liberally construed, which naturally implies a liberal construction of correlative liability to suit.

The crux of the question involved herein is whether in view of the specific powers conferred under the Statutes of New Jersey upon the State Highway Commission and the State Highway Commissioner, such State body and State official are immune from suit without the consent of the State of New Jersey. The merits of petitioner's claim for extras amounting to over three-quarters of a million dollars are not now under consideration. The issue is a confined one, and depends solely upon the legislative intent and the language of the statutes creating the State Highway Commission and creating the office of State Highway Commissioner in the light of the recent decisions of this Court recognizing the disfavor into which the age worn theory of sovereign immunity has fallen.

When the contract between petitioner and the State Highway Commission involved in this case was executed, Chapter 319 of the Pamphlet Laws of 1927 of the State of New Jersey, as amended by Chapter 221, Pamphlet Laws of New Jersey, 1929, governed the transaction.

The State Highway Commission was authorized by Section 106, Chapter 319 of P. L. 1927 as follows:

“The State Highway Commission shall take charge of all work on State highways and maintain the same in good order. All work of improvement, betterment, reconstruction, or resurfacing shall be done in accordance with plans and specifications prepared by the State Highway Department. *All work of maintenance, repair and extraordinary repair shall be done at the expense of the State and may be done either as an independent contractor or employer or through contracts made in the name of the State of New Jersey.*”

By Chapter 221, Public Laws of 1929, the Commission was authorized by Section 111 as follows:

“In addition to, and not in limitation of, its general powers, the State Highway Commission shall have power—

“a. To determine and adopt rules, regulations and specifications and to enter into contract covering all matters and things incident to the acquisition, improvement, betterment, construction, reconstruction, maintenance and repair of State highways.

“b. To execute and perform *as an independent contractor* or through contracts made in the name of the State of New Jersey, all manner of work incident to the maintenance and repair of State highways.”



The same Act defines said highway system as including, among other items, "All bridges" (Chapter 319, P. L. 1927, page 730).

Extraordinary repairs are defined in said Act (Page 731) as:

"Extensive or entire replacement, with the same or a different kind of material, of one or more of the component factors of the original improvement of a road, which may become necessary because of wear, disintegration or other failure."

By Subdivision E of Section III of said law of the State of New Jersey, the State Highway Commission was authorized:

"To do and perform all acts now required by law to be done and performed by the State Commissioner of Public Roads, the State Highway Commission and the Highway Commission. *These powers are to be liberally construed*". (Page 726.)

The contract in question was by its express terms and provisions executed by virtue of the authority vesting with said Commission by reason of Chapter 319, Public Laws of New Jersey, 1927.

The State Highway Commission, also by express legislative authority (same act), did determine and adopt rules, regulations, and specifications. The specifications forming a part of the contract between the parties contained the following:

"In any case where the contractor deems extra compensation is due him for work or materials not clearly covered in the contract, or not ordered by the engineer as an extra, as defined herein, the contrac-

tor shall notify the engineer of his intention to make claim for such extra compensation before he begins the work on which he bases the claim. If such notification is not given, or the engineer is not afforded proper facilities by the contractor for keeping strict account of actual cost, then the contractor hereby agrees to waive the claim for such extra compensation. Such notice by the contractor, and the fact that the engineer has kept account of the cost as aforesaid, shall not in any way be construed as proving the validity of the claim. *The claim must be passed upon by the Commission. In case the claim is found to be just, it shall be allowed and paid as an extra as provided herein for extra work*". (R. 113.)

The provisions of the foregoing statutes, as well as the statute under which the State Highway Commission was originally created (P. L. 1917, Chap. 15, p. 35), considered as a whole, indicate that it was the intent of the legislature to set up an independent body authorizing it to perform the work and to act in its own name, making contracts in its own name, and having complete control over payment, supplying it with a fund from which to make the payments, not made up solely of appropriations from year to year but from receipts from certain sources in the future <sup>such</sup> ~~and~~ as gasoline taxes and <sup>motor</sup> ~~motor~~ vehicle registration fees (P. L. 1927, Chap. 331, p. 778). It is precisely the same situation as if an independent corporation with the usual attributes had been set up by the state.

The recent trend of the law has been that in order for a governmental body to successfully maintain the defense of immunity, such right must inhere from express language used in the Act creating the body. On the contrary, liabil-

ity to suit may properly be implied from the general language in the Statute and the legislative purpose behind the Statute. Taking these two theories and applying them to the case at bar, we find that *nowhere in the Statute creating the State Highway Commission is there an express immunity from suit granted*. On the contrary, the fact that the State Highway Commission may perform its work *as an independent contractor* (which it did in the instant case) creates the irresistible conclusion that the State Legislature must have intended that the State Highway Commission was subject to suit.

It is interesting to note that in the New Jersey Supreme Court decision denying certiorari on the ground of immunity, the Court said:

“The Legislature could have set up a tribunal akin to the Federal Court of Claims, but in the absence of such action, no Court may subject the sovereign to suit.”

In the light of the precise language in the Statute enabling the Commission to engage in its work as an independent contractor, it is submitted that the foregoing quotation begs the question.

Immunity from suit of the various governmental bodies created by Congress has fallen into disfavor. The most recent decisions in which the question has arisen without exception recognize that each governmental body is subject to suit—notwithstanding there is usually an absence of any provision in the legislation stating that such body may sue or be sued. The general purposes behind the legislation has been inquired into, and universally it has been held that

the best purposes of the nation would be served by recognizing liability to suit. It was so held in *Federal Land Bank v. Priddy*, 295 U. S. 295, *Keifer vs. Reconstruction Finance Corp.*, 306 U. S. 381, *Federal Housing Administration vs. Burr*, 309 U. S. 242, and *Reconstruction Finance Corp. vs. Menihan*, 312 U. S. 81.

It is no answer to petitioner's contentions to say that the failure of the State of New Jersey to create a Court of Claims is fatal to petitioner's relief. Petitioner is guaranteed certain rights under the Federal Constitution, and if the action of the New Jersey Courts by clinging to the age worn doctrine of sovereign immunity as applied to governmental bodies is destructive of such rights, petitioner is entitled to relief in the Federal Courts.

### Conclusion.

**It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the decision of the New Jersey Court of Errors and Appeals.**

Dated: July 25, 1942.

LIONEL P. KRISTELLER,  
SAUL J. ZUCKER,  
Attorneys for and of Counsel  
with Petitioner.





11  
SEP 8 1942

CHARLES ELMORE CRO  
OLE

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1942

No. 262-263-264

STROBEL STEEL CONSTRUCTION COMPANY,  
a corporation,  
*Petitioner and Appellant below,*  
  
v.

STATE HIGHWAY COMMISSIONER OF THE STATE  
OF NEW JERSEY,  
*Respondent and Appellee below.*

**BRIEF IN OPPOSITION TO PETITION FOR WRIT  
OF CERTIORARI**

Joseph Lanigan

DAVID T. WILENTZ,  
*Attorney General of New Jersey.*

WILLIAM J. MCCORMACK,  
*Assistant Counsel to State Highway  
Commissioner,  
Attorneys for Respondent,  
State House, Trenton, New Jersey.*

DAVID T. WILENTZ,  
*of Counsel.*





## INDEX

---

	PAGE
Jurisdiction .....	1
Statement of the Case .....	2
Summary of Argument .....	4
ARGUMENT:	
POINT I—The questions attempted to be presented here are not now properly before this court	5
POINT II—The state court decided the case on in- dependent grounds not within the federal ob- jections taken, which independent grounds were sufficient to sustain the judgment.....	6
POINT III—The petitioner has not been deprived by the determination of the state court sought to be reviewed of any right guaranteed to it under the Fourteenth Amendment to the Constitution of the United States .....	7
CONCLUSION .....	16
Appendix .....	17
Opinion, <i>Strobel Steel Construction Company v. State Highway Commission</i> .....	17
Budget Act .....	24
Diversion Act .....	28

### TABLE OF CASES.

<i>In re Ayres</i> , 123 U. S. 443, 31 L. ed. 216, 8 S. Ct. 164. .9,	10
<i>Bank of Washington v. Arkansas</i> , 61 U. S. 530, L. ed. 993 .....	15
<i>Beers v. Arkansas</i> , 61 U. S. 527, 15 L. ed. 991 .....	7
<i>Board of Tenement House Supervision v. Schlecter</i> , 83 N. J. L. 88 .....	12

	PAGE
<i>Cunningham v. Macon and Brunswick R. R. Co., et al.</i> , 109 U. S. 446, 451, 27 L. ed. 992, 3 S. Ct. 292.....	10
<i>Curtis and Hill Gravel and Sand Co. v. State Highway Commission</i> , 91 N. J. Eq. 421 .....	11
<i>DeSantis v. Delaware, Lackawanna and Western Rail- road, et al.</i> , 11 N. J. Mis. R. 22 .....	11, 12
<i>Duhne v. New Jersey</i> , 251 U. S. 311, 64 L. ed. 280, 40 S. Ct. 154 .....	7
<i>Federal Housing Administration v. Burr</i> , 309 U. S. 242	12
<i>Hagood v. Southern</i> , 117 U. S. 52, 29 L. ed. 805, 6 S. Ct. 608 .....	10
<i>Hans v. Louisiana</i> , 134 U. S. 1, 33 L. ed. 842, 10 S. Ct. 504 .....	7
<i>Haycock v. Jannarone</i> , 99 N. J. L. 183 .....	11
<i>Keifer v. Reconstruction Finance Corp.</i> , 306 U. S. 381..	12
<i>Louisiana v. Jumel</i> , 107 U. S. 711, 27 L. ed. 448, 2 S. Ct. 128 .....	10
<i>McCaulley v. Kellog</i> , 2 Woods 13, 23 .....	9
<i>Minnesota v. Hitchcock</i> , 185 U. S. 373, 386, 46 L. ed. 954, 22 S. Ct. 650 .....	9
<i>Missouri, ex rel. Hurwitz v. North</i> , 271 U. S. 40, 70 L. ed. 818, 46 S. Ct. 384 .....	15
<i>Nesbitt v. Board of Managers, New Jersey Agriculture Experiment Station</i> , 10 N. J. Mis. R. 19 .....	11
<i>Osborne v. United States Bank</i> , 22 U. S. 738, 6 L. ed. 204 .....	9
<i>Palmer v. Ohio</i> , 248 U. S. 32, 63 L. ed. 108, 39 S. Ct. 16	7
<i>Pennoyer v. McConnaughy</i> , 140 U. S. 1, 35 L. ed. 363, 11 S. Ct. 699 .....	9, 10
<i>Reconstruction Finance Corp. v. Menihan</i> , 312 U. S. 81	12
<i>Reeside v. Walker</i> , 52 U. S. 272, 13 L. ed. 693, 700 ...	6, 10
<i>Smith v. Reeves</i> , 178 U. S. 436, 448, 44 L. ed. 1140, 20 S. Ct. 919 .....	7, 10
<i>Ex parte Spies</i> , 123 U. S. 131, 31 L. ed. 80 .....	1
<i>State Highway Commission v. Elizabeth</i> , 102 N. J. Eq. 221, affd. 103 Id. 375 .....	12

## PAGE

<i>Stephens v. The Commissioners of the Palisades Interstate Park</i> , 93 N. J. L. 500 .....	11
<i>Strobel Steel Construction Company v. State Highway Commission</i> , 120 N. J. L. 298 .....	2, 12
<i>Strobel Steel Construction Company v. Sterner</i> , 128 N. J. L. 379 .....	3
<i>Union Indemnity Co. v. State Highway Commission</i> , 105 N. J. L. 656 .....	12

## NEW JERSEY STATUTES

P. L. 1917, c. 15 .....	3, 7
P. L. 1923, c. 6 .....	4, 7
P. L. 1935, c. 178 .....	4, 7
P. L. 1933, c. 193, p. 418 .....	7
P. L. 1936, c. 26 .....	8
P. L. 1927, c. 319 .....	13, 14
P. L. 1927, c. 319 .....	14
P. L. 1927, c. 319 .....	14
Revised Statute, 52 :22-20 .....	7
" " 27 :1-1 .....	8
" " 27 :1-2 .....	8
" " 27 :1-5 .....	8
" " 27 :1-7 .....	9
" " 32 :14-2 .....	10
" " 32 :3-5 .....	11
" " 31 :8-3 .....	11
" " 12 :12-2 .....	11
" " 13 :5-2 .....	11

## UNITED STATES CODE

28 U. S. C. § 350 .....	6
-------------------------	---

## TEXT BOOKS.

27 R. C. L., title "States", § 83, p. 78 .....	6
25 R. C. L., title "States", § 50, p. 413 .....	9
25 R. C. L., title "States", § 49, p. 412 .....	12, 13
25 R. C. L., title "States", § 52, p. 416 .....	15



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1942

---

No. 262-263-264

---

---

STROBEL STEEL CONSTRUCTION COMPANY, a corporation,  
*Petitioner and Appellant below,*

*v.*

STATE HIGHWAY COMMISSIONER OF THE STATE OF  
NEW JERSEY,  
*Respondent and Appellee below.*

---

**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF  
CERTIORARI**

(Except as otherwise noted all italics are ours.)

---

**Jurisdiction**

We submit the writ ought not to be allowed because the questions presented by the record are no longer subjects of discussion in this court. *Ex parte Spies*, 123 U. S. 131, 31 L. ed. 80.

This court has continuously held that an action against a state officer or body is an action against the state when the state, though not named, is the real party against whom the relief is sought, and the judgment will operate, and that no rights under the Fourteenth Amendment are violated by the dismissal by a state court of an action brought against

the state. The decision sought to be reviewed is in accord with the decisions of this court.

Although petitioner asks a review of a judgment of the New Jersey Court of Errors and Appeals on April 30, 1942, it is really attempting to review an earlier decision of that court made on April 29, 1938. At that time the state court held that the contract which forms the subject of the present action was a contract of the State of New Jersey, and that the respondent was its *alter ego*, not suable without consent. The decision presently sought to be reviewed is a holding by the state court that the petitioner can not enforce this same contract indirectly by means of the prerogative writs of *mandamus* and *certiorari*.

### Statement of the Case

On July 10, 1929, petitioner entered into a contract with respondent's predecessor, the State Highway Commission of the State of New Jersey, wherein petitioner agreed to construct a bridge over the Hackensack River for the Commission (R. 108-111). Petitioner defaulted on November 6, 1930 (R. 62, 63, 152) and its surety completed the work (R. 153).

On November 4, 1936, petitioner instituted an action at law in the New Jersey Supreme Court seeking recovery of money damages claimed to be due under the contract. The trial court struck the complaint. Petitioner appealed and, on April 29, 1938, the action of the Supreme Court was affirmed by the New Jersey Court of Errors and Appeals, the court holding that the suit was, in effect, a suit against the state itself and could not be maintained because legislative consent had not been given. The court further held that it was not the intent of the legislature to set up the Highway Commission as an independent body which might be sued. *Strobel Steel Construction Company v. State Highway Commission*, 120 N. J. L. 298 (R. 210-211). Peti-

tioner made no effort to have this court review that decision. As petitioner has not inserted a copy of this opinion in the record, we have set it forth in full in the appendix to this brief (p. 17).

On November 18, 1936, petitioner obtained from Justice Case of the New Jersey Supreme Court an order why "*a rule to show cause should not be made for the issuance of a peremptory or alternative writ of mandamus*" directing the Highway Commissioner and State Treasurer to pay the identical claims for which recovery was sought in the action at law (R. 1, 27-28, 211-212) and urged the same contract as the basis of its application. When this matter was moved for argument on January 4, 1939, Justice Case denied a writ, peremptory or alternative, but granted petitioner permission to mould the proceedings on an alternative writ so that the questions decided by him might be presented by appeal to the New Jersey Court of Errors and Appeals (R. 82, 83, 84, 225-228). Three proposed writs were presented by petitioner to Justice Case (R. 85-165). Their mandates varied (R. 90, 98, 164-165). The one finally signed contained a direction to the Commissioner "*to pass upon the claims of the Relator, Strobel Steel Construction Co.*" (R. 165), as distinguished from the payment of its claims, the action sought under the rule to show cause (R. 27-28, 225-228). The Supreme Court sustained respondent's demurrer to this writ and this action was affirmed by the Court of Errors and Appeals. *Strobel Steel Construction Company v. Sterner*, 128 N. J. L. 379 (R. 259, *et seq.*). This affirmance constitutes part of the action of the state court sought to be reviewed here. Part of the decision sought to be reviewed held that no appeal would lie from the refusal of the Supreme Court to vacate the rule for judgment entered on the moulded writ, since the action of the Supreme Court was discretionary (R. 191, 259-267).

At the time the contract between the parties was made the New Jersey State Highway Department was headed by a four man commission (P. L. 1917, c. 15, as amended by

P. L. 1923, c. 6). In 1935 this commission was abolished and a single commissioner substituted (P. L. 1935, c. 178). E. Donald Sterner was appointed Commissioner. He has since been succeeded by Spencer Miller, Jr.

On July 25, 1933, the four man commission determined at an open meeting in the presence of representatives of petitioner's bonding company that there was due to petitioner a balance of \$8,520.48 (R. 149-151). A copy of the estimate certificate appears in the record at page 230.

Because petitioner argued in the mandamus proceedings that its claims had not been passed upon, Highway Commissioner Sterner, the department head appointed under the 1935 Act, invited petitioner to present its claims to him. This offer petitioner did not accept (R. 221-222; 232-236). The Commissioner then proceeded to investigate petitioner's claims and made a determination that the sum due was \$8,520.48 (R. 151-157). In January, 1940 petitioner applied to the New Jersey Supreme Court for a writ of certiorari to review this determination. It abandoned this application. In January, 1941 it again applied to the same court for a writ of certiorari. This application was denied (R. 237-239) and, on appeal, the Court of Errors and Appeals held that the refusal of the writ was not appealable, 128 N. J. L. 279 (R. 259, *et seq.*). This action of the state court is also sought to be reviewed.

### **Summary of Argument**

We urge that the writ should not be granted because:

1. Petitioner is here attempting to have this court review questions which it should have presented to the court in 1938.
2. The state court decided the cases presently attempted to be reviewed on grounds that did not require the determination of a question involving constitutional rights; and



3. Because the decision of the state court sought to be reviewed did not deprive petitioner of any constitutional rights.

Under this third point we urge that the contract which forms the basis of this action is a contract of the State of New Jersey which cannot be enforced without the state's consent, the Highway Department being a branch of the executive department of the state government and its head, an administrative officer of the state. We urge that petitioner is not seeking relief against the officer as an individual, but is attempting to enforce a contract of the state, controlling the action of the state and subjecting it to liability, contrary to the firmly established principles of American jurisprudence.

## ARGUMENT

---

### POINT I

**The questions attempted to be presented here are not now properly before this court.**

The Court of Errors and Appeals of New Jersey decided on April 29, 1938, that the State Highway Commission is an *alter ego* of the State and that the suit brought against it at law by the present petitioner was a suit against the State and would not lie. That court, in that suit, construed the statutory provisions set forth on pages 12 and 13 of petitioner's brief and attempted to be presented as Question 1. It held the New Jersey legislature did not intend to give consent that the Commission might be sued. It further held that, since petitioner did not see fit to argue the constitutional points raised in that case (and now attempted to be raised in this court as Question 2), it would only say there was no merit in them. 120 N. J. L. 298 (Appendix to this brief). A review of that decision would have brought

before this court both questions now attempted to be presented, but petitioner did not see fit to seek that course.

As was said by the court below, citing *Reeside v. Walker*, 52 U. S. 272, 13 L. ed. 693, 700, the actions which have presently resulted in this appeal were attempts by means of *certiorari* and *mandamus* to accomplish by indirection the enforcement of a contract which it had been already held petitioner could not accomplish directly.

It is submitted that petitioner should have sought *certiorari* within three months after the original decision. 28 U. S. C. § 350.

## POINT II

**The state court decided the case on independent grounds not within the federal objections taken, which independent grounds were sufficient to sustain the judgment.**

The opinion below, 128 N. J. L. 379 (R. 259, *et seq.*), distinctly shows that the court decided that the refusal of the Supreme Court to allow petitioner's application for *certiorari* was a discretionary act and not reviewable. It also shows that all other grounds urged, except the question of passing upon claims, were discretionary acts and not appealable.

As to whether the Commissioner could be required to pass upon petitioner's claims, it will be seen that the court held that, although there was no requirement to do so, he did pass upon the claims and rejected them (R. 260).

It will be plainly seen that the state court decided the case on grounds that did not require the determination that these actions could not be brought against the State and, therefore, this court will not review the case. 27 R. C. L., title "*States*" § 83, page 78, and numerous cases cited.

### POINT III

**The petitioner has not been deprived by the determination of the state court sought to be reviewed of any right guaranteed to it under the Fourteenth Amendment to the Constitution of the United States.**

The right of individuals to sue a state, in either a Federal or a state court, cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the state. *Beers v. Arkansas*, 61 U. S. 527, 15 L. ed. 991; *Hans v. Louisiana*, 134 U. S. 1, 33 L. ed. 842, 10 S. Ct. 504.

No rights guaranteed under the Fourteenth Amendment are violated by the dismissal by a state court of an action brought against the state. *Palmer v. Ohio*, 248 U. S. 32, 63 L. ed. 108, 39 S. Ct. 16.

The State of New Jersey cannot be sued without its consent. *Smith v. Reeves*, 178 U. S. 436, 448, 44 L. ed. 1140, 20 S. Ct. 919; *Duhne v. New Jersey*, 251 U. S. 311, 64 L. ed. 280, 40 S. Ct. 154.

The State Highway Commissioner is an administrative officer of the government and the State Highway Department is a branch of the executive department of the government of New Jersey.

The State Highway Department was established in 1917 (P. L. 1917, Chap. 15, p. 35). Under that Act it consisted of the Governor and eight members appointed by him with the advice and consent of the Senate. It was subsequently provided (P. L. 1923, Chap. 6, p. 19), that the State Highway Department should be governed by a Board of four members. Since that time the four man board has been legislated out of existence and the office of State Highway Commissioner created (P. L. 1935, Chap. 178, p. 440).

The Department operates under a budget as provided in P. L. 1933, Chap. 193, page 418 (R. S. 52:22-20), partially

set forth in the appendix. Its funds are the funds of the State and have been diverted by the legislature for emergency relief (P. L. 1936, c. 26, set forth in the appendix, and other similar acts).

The New Jersey Statutes provide:

*"27:1-1. The administrative organization heretofore established and designated as the state highway department, hereafter in this title referred to as the department, shall be continued subject to the provisions of this chapter, as a branch of the executive department of the state government, and the state highway commissioner heretofore appointed pursuant to the provisions of an act entitled 'An act to establish the office of state highway commissioner and to define the powers and duties thereof and to vest all the powers and duties now devolved by law upon the state highway department and the state highway commissioner', approved April twenty-ninth, one thousand nine hundred and thirty-five, is hereby continued in office for the remainder of the term of office for which he was appointed."*

And 27:1-2:

*"The department shall be deemed to consist of the state highway commissioner, and all officers and employees continued in offices or employments or appointed under the provisions of this chapter, but all the powers of the department shall reside in the state highway commissioner as the administrative head thereof."*

And 27:1-5:

*"The commissioner shall succeed to and exercise all the powers and perform all the duties exercised or performed by the state highway department and the state highway commission, or either of them, as constituted prior to April twenty-ninth, one thousand nine hundred and thirty-five, by virtue of any then existing law or laws."*

And 27:1-7:

"In general, the commissioner shall be the administrative and executive head of the department. He shall devote full time to the duties of his office."

It was at one time held that the Eleventh Amendment to the Constitution of the United States, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign State", was applicable only to cases in which the State was named in the record as a party defendant. *Osborne v. United States Bank*, 22 U. S. 738, 6 L. ed. 204. But later rulings have modified that decision, and held that the amendment applies to any suit brought in name against an officer of the State, when "*the State, though not named, is the real party against which the relief is asked, and the judgment will operate.*" *In re Ayres*, 123 U. S. 443, 31 L. ed. 216, 8 S. Ct. 164; *Pennoyer v. McConnaughy*, 140 U. S. 1, 35 L. ed. 363, 11 S. Ct. 699; *Minnesota v. Hitchcock*, 185 U. S. 373, 386, 46 L. ed. 954, 22 S. Ct. 650.

Although the action is brought against a state officer, the ultimate result sought by the petitioner is the enforcement of a contract of the state and is therefore a suit against the state. *McCaulley v. Kellog*, 2 Woods 13, 23. This is particularly emphasized by the fact that petitioner brought its action at law against the *Highway Commission*, then amended it so as to direct the action there, as now here, against the *Commissioner*. He is not sued as an individual but as a state officer. (See opinion in appendix.)

The relief sought by petitioner, although nominally against the State Highway Commissioner is actually sought against the state and would operate to control the action of the state and subject it to liability, and therefore will not lie. 25 R. C. L., title "*States*", § 50, page 413, and cases cited.

It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as a defendant in any court in this country without their consent, except in the limited class of cases in which a state may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on that court by the Constitution. *Cunningham v. Macon and Brunswick R. R. Co., et al.*, 109 U. S. 446, 451, 27 L. ed. 992, 3 S. Ct. 292.

We cite a few of the many cases in which it has been held that a suit against a state officer is a suit against a state:

- Louisiana v. Jumel*, 107 U. S. 711, 27 L. ed. 448, 2 S. Ct. 128 (State Auditor, Treasurer and Board of Liquidation);
- Hagood v. Southern*, 117 U. S. 52, 29 L. ed. 805, 6 S. Ct. 608 (State Treasurer, Comptroller General and others);
- Ex parte Ayres*, *supra* (State Auditor and Attorney General);
- Smith v. Reeves*, *supra* (State Treasurer);
- Pennoyer v. McConnaughy*, *supra* (Land Commissioners).

Petitioner cannot do indirectly by *mandamus* and *certiorari* that which the highest state court held in April, 1938 it could not do directly by an action at law. *Reeside v. Walker*, 52 U. S. 272, 13 L. ed. 693, 700.

Where the New Jersey Legislature has intended that state agencies should be subject to suit, it has expressly said so. We cite a few examples of the expression of the Legislative intent.

The Act creating the *Commissioners of Palisades Park* provides (R. S. 32:14-2):

"Corporate powers of board, actions; seal; by-laws. The board of commissioners and its successors shall be

a body politic, with power to sue and be sued, use a common seal and adopt by-laws to regulate its proceedings."

And the act creating the *Delaware River Joint Commission* (R. S. 32:3-5) :

"For the effectuation of its authorized purposes the commission is hereby granted the following powers:

b. To sue and be sued."

The *Delaware River Joint Toll Bridge Commission* (R. S. 32:8-3), enumerating powers:

"\* \* \* b. To sue and be sued."

And the *South Jersey Port District* (R. S. 12:12-2) :

"The District is hereby declared to be a public corporation and body politic and shall have power to:

b. Sue and be sued."

Also the *Port Raritan District* (R. S. 12:12-2), enumerating powers:

"b. Sue and be sued."

And *High Point Park* (R. S. 13:5-2) :

"The board of commissioners and its successors shall be a body politic, with power to sue and be sued \* \* \*."

The New Jersey courts have uniformly held that actions against state officials and bodies are actions against the state which will not lie unless express legislative consent is given. *Curtis and Hill Gravel and Sand Co. v. State Highway Commission*, 91 N. J. Eq. 421; *Haycock v. Jannarone* (Court of Errors and Appeals), 99 N. J. L. 183; *Nesbitt v. Board of Managers, New Jersey Agriculture Experiment Station*, 10 N. J. Mis. R. 19; *Stephens v. The Commissioners of the Palisades Interstate Park* (Court of Errors and Appeals, 1919), 93 N. J. L. 500; *DeSantis v. Delaware*,

*Lackawanna and Western Railroad, et al.*, 11 N. J. Mis. R. 22; *Board of Tenement House Supervision v. Schlecter*, 83 N. J. L. 88; *State Highway Commission v. Elizabeth*, 102 N. J. Eq. 221; *affirmed* (Court of Errors and Appeals), 103 Id. 375; see also the interesting comment in the *per curiam* opinion in *Union Indemnity Co. v. State Highway Commission*, 105 N. J. L. 656 (at p. 657); *Strobel Steel Construction Company v. State Highway Commission*, 120 N. J. L. 298.

While it is true that suits have been permitted against private corporations formed under federal authority where the words "*to sue and be sued*" do not appear, yet in each such instance it has been clear that it was intended that such private corporations might be sued. There is a vast distinction between the actions against legislatively authorized bodies incorporated under general corporation laws permitted in *Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, *Federal Housing Administration v. Burr*, 309 U. S. 242, and *Reconstruction Finance Corp. v. Menihan*, 312 U. S. 81, cited by petitioner and the present effort to enforce a contract against a sovereign state.

The funds expended for the work of the Highway Department are the funds of the state. They are expended through the usual state channels. The Department's work is the construction and maintenance of a state highway system reaching throughout the state and benefitting all its citizens.

It is stated in 25 R. C. L. title "*States*", § 49, p. 412:

"49. General Rule as to State's Immunity from Suit. —*It is well settled that a state cannot be sued in its own courts, or in any other, unless it has expressly consented to such suit, except in the limited class of cases in which a state may be made a party in the supreme court of the United States, by virtue of the original jurisdiction conferred on such court by the constitution. The doctrine rests upon reasons of public policy—the inconvenience and danger which would fol-*



*low from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government."*

In the footnotes below the citation there appear many cases decided by this court.

The reason for the rule is particularly apparent in this case, the present petitioner, having defaulted on its contract, waited until two days before the statute of limitations would have run before bringing its action at law. It then made application for *mandamus* which was carried on over a period of five years (R. 1, 191). *Certiorari* was applied for in 1941 (R. 194). A previous application for a writ of *certiorari* was noticed and abandoned. Testimony was taken in the Court of Chancery (R. 195) and in many other ways the state's operations have been hindered.

It is evident from a full reading of the quotation from the specifications appearing on pages 13 and 14 of the petitioner's brief (the italics there being the petitioner's solely) that it was intended as a reservation by the Commission of the right and responsibility to itself of deciding whether a claim for extras should be allowed.

Whether the power given to the Highway Commission to enter contracts as an independent contractor is to be construed as a consent to a suit against the state is not involved in this case. The contract here was for the *construction* of a bridge (R. 109). The statutory provisions relied on by petitioner to sustain its action all deal with *repairs and maintenance*, not *construction*.

P. L. 1927, chapter 319, par. 106 reads as follows:

"The State Highway Commission shall take charge of all work on State highways and maintain the same

in good order. All work of improvement, betterment, reconstruction, or resurfacing shall be done in accordance with plans and specifications prepared by the State Highway Department. All work of *maintenance, repair and extraordinary repair* shall be done at the expense of the State and may be done either as an independent contractor or employer or through contracts made in the name of the State of New Jersey."

P. L. 1927, chapter 319, par. 111 provides:

"111. In addition to, and not in limitation of, its general powers, the State Highway Commission shall have power—

a. To determine and adopt rules, regulations and specifications and to enter into contracts covering all matters and things incident to the acquisition, improvement, betterment, construction, reconstruction, maintenance and repair of State Highways.

b. To execute and perform as an independent contractor or through contracts made in the name of the State of New Jersey, all manner of work incident to the *maintenance and repair* of State highways.

c. To establish and maintain as an independent contractor or employer a patrol repair system for the proper and efficient maintenance and repair of State highways \* \* \*."

And the statute defines "*maintenance*" and "*repair*", par. 118, at page 731:

"*Maintenance*: Continuous work required to hold an improved road against deterioration due to wear and tear and thus to preserve the general character of the original improvement without alteration in any of its component factors."

"*Repairs*: Limited or minor replacements in one or more of the component factors of the original improvement of a road which may be required by reason of storm or other happening in order that there may be restored a condition requiring only maintenance to preserve the general character of the original improvement of a road."

The same Act defines "*extraordinary repair*" as:

"Extensive or entire replacement, with the same or a different kind of material, of one or more of the component factors of the original improvement of a *road*, which may become necessary because of wear, disintegration or other failure."

The State Court held that the statutory provisions relied on by petitioner did not constitute an intent that the highway department be subject to suit. 120 N. J. L. 298 (Appendix).

The construction of a statute by a state court is binding on this court. *Missouri, ex rel. Hurwitz v. North*, 271 U. S. 40, 70 L. ed. 818, 46 S. Ct. 384.

There is no provision in the New Jersey statutes permitting the Highway Department to enter a *construction* contract as an independent contractor. Furthermore it is a fundamental rule of construction that what is not clearly granted by the state is withheld, and that statutes permitting suits against the state, being in derogation of sovereignty, must be strictly construed. 25 R. C. L. title "*States*", § 52, page 416.

Petitioner knew when it entered the contract that, in the event of a breach thereof, its only remedy was an appeal to the state legislature. *Bank of Washington v. Arkansas*, 61 U. S. 530, L. ed. 993.

We submit that there is no trend toward any implication that state legislatures have intended that state officers performing state duties may be sued unless the legislature expressly provides otherwise. The law is settled to the contrary throughout the country. States can function through officers and agents only. It has not been the legislative practice in any state, when creating a state office or agency, to insert a provision that such state officer or state agency should not be subject to suit. We have not found a de-

cision anywhere in the country which has permitted suit against state officers or agencies representing the state in the absence of expressed consent. If the law were otherwise the Eleventh Amendment would be completely nullified as far as the sovereignty of every state in the union is concerned. In the event of a present holding to the contrary the programs and financial structures of every state in the union will be thrown into complete chaos.

## CONCLUSION

**For the reasons above urged, it is respectfully submitted that the petition for a writ of certiorari should be denied.**

DAVID T. WILENTZ,  
Attorney General of New Jersey.

WILLIAM J. McCORMACK,  
Assistant Counsel to  
State Highway Commissioner.  
*Attorneys for Respondent.*

DAVID T. WILENTZ,  
*of Counsel.*





## APPENDIX

### Opinion

*Strobel Steel Construction Company, a Corporation, Plaintiff-Appellant v. State Highway Commission of the State of New Jersey, Defendant-Respondent*, 120 N. J. L. 298.

Argued February 2, 1938—Decided April 29, 1938.

1. It is an established principle of jurisprudence in all civilized nations, that the sovereign cannot be sued in its own courts without its consent.
2. It is a fundamental rule of construction that what is not clearly granted by the state is withheld and that statutes permitting suits against the state, being in derogation of sovereignty, must be strictly construed.
3. The statute creating the State Highway Commission (Pamph. L. 1917, p. 35), and the several amendments thereof, clearly show that the commission is an alter ego of the state, and cannot be sued as a separate entity or corporation; for if the legislature had intended that it should be subject to suit it would have said so in plain and explicit language, and it is the settled rule that such sovereign right cannot be taken away by mere inference or legal construction.

---

On appeal from the Supreme Court.

For the appellant, John J. Stamler and Merritt Lane.

For the respondent, David T. Wilentz, attorney-general, William A. O'Brien, Benjamin G. VanTine and William J. McCormack, assistant attorney-generals.

The opinion of the court was delivered by

Wells, J. This is an action by the plaintiff, a contractor, against the State Highway Commission of the State of New Jersey, to recover an alleged balance due to it under

*Appendix.*

a contract whereby it agreed to furnish and deliver all material and labor for the construction of Route No. 10, in conformity with the specifications of the State Highway Department, and whereby the State Highway Commission agreed to pay to the plaintiff "for said work when completed in accordance with said plans and specifications" the prices specified in said contract.

The complaint originally filed improperly named the State Highway Commission rather than the State Highway Commissioner as the defendant. See Pamph. L. 1935, ch. 178, p. 440 (1 Rev. Stat. 27:1-1). An amendment was allowed correcting this mistake.

Before this amendment was allowed, however, an application was made to the trial court sitting as Supreme Court commissioner, to quash the summons and dismiss the complaint upon the ground that the State of New Jersey could not be sued in its own court without its consent and that a suit against the State Highway Commission, an agency of the state, was in effect a suit against the state itself, and could not be maintained because consent to be sued had not been given.

The trial court struck the complaint, holding that the suit was one in effect against the state, relying upon *Curtis and Hill Gravel and Sand Co. v. State Highway Commission* (Court of Chancery, 1920), 91 N. J. Eq. 421, &c., wherein Vice-Chancellor Buchanan said:

"That the State Highway Commission is an alter ego of the state and not a mere subordinate is so clear as to need little discussion. The statute (Pamph. L. 1917, p. 35, § 1) creates a State Highway Department 'to be governed by a board to be known as the State Highway Commission.' The members of the commission are the governor himself, ex-officio, and eight members appointed by the governor by



*Appendix.*

and with the advice and consent of the senate. The contracts made by the commission are clearly contracts of the state—they may be made either in the name of the state or of the commission. The funds expended for its work are the funds of the state, and expended through the usual state channels. The work which it is to do is the construction and maintenance of a state highway system, reaching throughout the entire state and for the benefit of all the citizens, not merely in or for the benefit of any particular locality of the citizens thereof."

With this enunciation of the learned vice-chancellor we are in accord. There have been numerous decisions in the courts of our state to the same general effect, some of which cite *Curtis and Hill Gravel and Sand Co. v. State Highway Commission*, *supra*; see *Haycock v Jannarone* (Court of Errors and Appeals), 99 N. J. L. 183; *Nesbitt v. Board of Managers, New Jersey Agriculture Experiment Station* (Supreme Court, 1931), 10 N. J. Mis. R. 19; *Stephens v. The Commissioners of the Palisades Interstate Park* (Court of Errors and Appeals, 1919), 93 N. J. L. 500; *DeSantis v. Delaware, Lackawanna and Western Railroad, et al.* (Supreme Court, 1933), 11 N. J. Mis. R. 22; *Board of Tenement House Supervision v. Schlechter* (Supreme Court, 1912), 83 N. J. L. 88; *State Highway Commission v. Elizabeth*, 102 N. J. Eq. 221; affirmed, 103 Id. 375; see, also, interesting comment in this court's per curiam opinion in *Union Indemnity Co. v. State Highway Commission*, 105 N. J. L. 656 (at p. 657).

A suit brought against a state agency is, in fact, a suit against the state if the judgment obtained will operate to control the action of the state or subject it to liability. The answer to the question as to who will pay in the event of judgment in the instant case is apparent. Should this action be permitted and plaintiff succeeds it is the money of

*Appendix.*

the State of New Jersey that would be used in payment. See the Budget act, Pamph. L. 1933, ch. 193, p. 418.

This suit involves the property of the state and being predicated directly upon a contract made by state officers representing the state, it is in effect a suit against the state without its consent.

In *Lodor v. Baker*, 39 N. J. L. 49, the Supreme Court said (at p. 50) :

"With regard to state courts, it requires no constitutional provision to shield the state from suits by its own citizens, or by the citizens of another state. It enjoys this immunity as one of the essential attributes of sovereignty, it being an established principle of jurisprudence in all civilized nations, that the sovereign cannot be sued in its own courts without its consent. *State v. Kirby*, 2 South. 835; *Beers v. Arkansas*, 20 How. 527; *Dillon on Mun. Corp.*, § 14."

See, also, *American Dock and Improvement Co. v. Trustees, &c., of the Public Schools* (Court of Errors and Appeals, 1882), 35 N. J. Eq. 181 (at p. 252); 25 R. C. L. 412, § 49; 42 A. L. R. 1465.

Counsel for appellant conceded that the state cannot be sued without its consent and likewise conceded that an agency of the state that is solely such an agency cannot be sued without the consent of the state if in fact the suit is against the state. Appellant says the question is whether the State Highway Commission as it originally was, now the State Highway Commissioner, was such a body as that it must be assumed that the legislature intended that it should be subject to suit by contractors with whom it was authorized to contract in its own name for the performance of work.

In furtherance of its argument that such was the intention of the legislature, appellant recites the history of the

*Appendix.*

creation and operation of the highway department and quotes provisions from chapter 15 of the laws of 1917, page 35, &c., section 111, chapter 319, Pamph. L. 1927; Rev. Stat. 27:7-21 and other statutes and says that the provisions of the statutes, considered as a whole, indicate that it was the intent of the legislature to set up an independent body, authorizing it to perform the work and to make contracts in its own name and to have complete control over payment, supplying it with a fund which was not made up solely of appropriations from year to year but from receipts from certain sources in the future; that it is precisely the same situation as if the state had set up an independent corporation.

We cannot agree with the contention of appellant that the consent for suits against the highway commission or commissioner can be inferred from the language of the statutes. This contention is in conflict with the well settled principle of law that no public right can be taken away or protection of sovereign rights surrendered by mere inference or legal construction. Moreover, it may be said to be a fundamental rule of construction that what is not clearly granted by the state is withheld and that statutes permitting suits against the state, being in derogation of sovereignty, must be strictly construed. 25 R. C. L. 416, § 52.

In *New Jersey Interstate Bridge Commission v. Jersey City* (Court of Chancery, 1922), 93 N. J. Eq. 550, Chancellor Walker said (at p. 553):

"Statutes in derogation of sovereignty, such as those conferring powers on corporation, are to be strictly construed in favor of the state, and are not permitted to divest the state or its government of any of its prerogatives, rights or remedies, unless the intention of the legislature to effect such object is clearly expressed in the statute. 36 Cyc. 1177. No public right can be taken away by mere inference or legal construction \* \* \*."

*Appendix.*

If the legislature had intended that the highway commission, or commissioner, might be sued it could have said so in plain and explicit language as it did when creating other commissions—such as the Commissioners of Palisades Park (Rev. Stat., 32:14-2); Delaware River Joint Commission (Idem., 32:3-5); Delaware River Joint Toll Bridge Commission (Idem., 32:8-3); South Jersey Port District (Rev. Stat., 12:11-2); Port Raritan District (Idem., 12:12-2); High Point Park (Idem. 13:5-2), in all of which legislation, after stating that the board or commission was created a body politic, the words “with power to sue and be sued”, or their equivalent, are found.

Furthermore, we fail to see wherein the appellant has any cause for complaint. It knew when it entered into the contract, that in the event of a breach thereof, its remedy was an appeal to the legislature.

In the case of *Bank of Washington v. Arkansas*, 20 How. (U. S.) 530; 15 L. Ed. 993, in which a bill in Chancery was filed against the state to enforce the payment of money due on certain bonds made by the state, Chief Justice Taney said:

“The laws and proceedings on the part of the state may have operated harshly and unjustly upon the appellants. But it is not the province of this court to decide that question. Those who deal in the bonds and obligations of a sovereign state are aware that they must rely altogether on the sense of justice and good faith of the state; and that the judiciary of the state cannot interfere to enforce these contracts without the consent of the state, and the courts of the United States are expressly prohibited from exercising such a jurisdiction.”

Inasmuch as appellant has not seen fit to argue his second and third grounds of appeal in which he alleges a violation of his constitutional rights by reason of the trial

*Appendix.*

court's action, we shall not take the time to discuss the questions raised thereby except to say that we find no merit in them.

We concur in the conclusion reached by the learned trial court that the State Highway Commission or commissioner, as is now constituted, is an alter ego of the state; that any contracts made by the commission or commissioner are clearly contracts of the state; that in order to be sued it was necessary to obtain the consent of the state and that there is nothing to be found in the statute creating the highway commission or any amendment thereto, or in any other statutes, from which consent can be spelled out or inferred.

The action of the court below striking out plaintiff's complaint and entering judgment for the defendant is therefore affirmed.

For affirmance—The Chancellor, Chief Justice, Parker, Case, Bodine, Donges, Heher, Perskie, Hetfield, Dear, Wells, WolfsKeil, Rafferty, Walker, JJ. 14.

For reversal—None.

*Appendix.***Budget Act, P. L. 1933, Chapter 193, p. 418.**

AN ACT to amend an act entitled "An act to provide for a State Budgeting System and its operation", approved April twentieth, one thousand nine hundred and thirty-one.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. Section eighteen of the act to which this act is an amendement is hereby amended to read as follows:

18. (a) The State Highway Commission shall, on or before the fifteenth day of October in each year, submit to the Governor a report of the work and operations and financial condition of the department for the year (projecting same to December thirty-first), including itemized report of county and township allotments and commitments, in such form and in such detail as the Governor shall require.

(b) On or before the fifteenth day of October in such year the State Highway Commission shall submit to the Governor, in connection with its report for the then current year, a schedule of the estimated anticipated revenues available for highway purposes during the ensuing calendar year. \* \* \*

\* \* \* \* \*

(c) On or before the fifteenth day of October in each year the State Highway Commission shall submit to the Governor the schedule and program for which they propose to expend or use such funds for the ensuing calendar year, stating the dedicated fund items and the general fund items separately, according to purposes, routes and sections of routes. \* \* \*

\* \* \* \* \*

*Appendix.*

(d) The Governor shall review the schedule of anticipated revenues and program submitted by the State Highway Commission, as provided in subsections (b) and (c) hereof, and shall formulate his budget recommendations thereon and shall submit such recommendations to the Legislature at the same time that he submits to the Legislature the budget message provided in section eight of the act which this act is an amendment. \* \* \*

\* \* \* \* \*

(e) The State Highway Commission shall make a report to the Governor quarterly, and at such other times as the Governor may direct, as to the progress of its work in connection with the program as adopted and upon any project carried over from the preceding year, together with the condition of its revenues and finances all in such detail as the Governor may direct;

(f) On or before December tenth of each year the State Highway Commission shall notify the clerk of the board of chosen freeholders of each county as to the amount of county and township and borough aid which has been set up for the county and each municipality within the county applicable to the ensuing calendar year, and it shall be lawful for the several counties and municipalities to include such amount in their respective budgets whether such budget be adopted before or after the Legislature has enacted the State Highway Fund appropriation act as provided in this act;

(g) The Governor shall submit his recommendations to the Legislature as to the appropriations to be made under subdivisions (d-5), (d-6), (d-7), (d-8) and (d-9) of this act, in lump sum for each item, and who shall submit to the Legislature a detailed budget request as provided in section eight of this act for the recommendations relating to subdivision (d-4), above designated, and the Legisla-

*Appendix.*

ture shall, by separate appropriation act which shall take effect on the first day of January preceding its enactment in each year, and which shall be known as the State Highway Fund appropriation act, appropriate such items for the several purposes in lump sums as enumerated in subdivision (d) of this section which are required to be appropriated by this act. \* \* \*

\* \* \* \* \*

(i) All moneys now in the treasury of the State or which hereafter shall be received into such treasury from any and every source which are dedicated to highway purposes, which shall include all revenues from the motor fuel taxes and the motor vehicle license fees and fines shall be set up by the State Treasurer in a separate fund to be known as the State Highway Fund, and no money shall be withdrawn from such fund except as shall be included in the State highway appropriation fund act except for the purposes enumerated in subdivisions (d-1), (d-2) and (d-3) of this section, or for further grants of moneys to counties or municipalities for road purposes or for the payment of interest or principal on reimbursement obligations heretofore incurred for road purposes, and provided for in subsections (g) and (h) of this section, and none other, excepting as hereinafter provided for in this subdivision, and any unexpended or uncommitted balances of such appropriations shall revert back to the State Highway Fund. Nothing in this section contained shall be construed to prohibit the withdrawal of any money as received for the payment of the principal or interest of any bonded indebtedness of this State or for sinking fund purposes on any bonds heretofore or hereafter issued by the State, or for the amount of money appropriated by the Legislature for the collection of the tax on motor fuels, which moneys shall be withdrawn for such purposes upon certification of the State Treasurer;

\* \* \* \* \*



*Appendix.*

(1) In order to maintain a reasonable degree of flexibility, the State Highway Commission may, with the approval of the State House Commission, transfer funds from one item to another where such action seems to be in the best interests of the State and will tend to the economical operation of the State Highway Department; provided, however, that no item appropriated for any permanent construction improvement shall be transferred to any administrative item.

\* \* \* \* \*

Approved June 5, 1933.

*Appendix.***Diversion Act, Chapter 26, P. L. 1936.**

AN ACT making appropriation for emergency relief purposes in the fiscal year ending June thirtieth, one thousand nine hundred and thirty-six.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. There is hereby appropriated, the State Comptroller is hereby authorized and directed to draw his warrants on the State Treasurer for, and the State Treasurer is hereby authorized and directed upon such warrant to pay or to place to the credit of the State Emergency Relief Council, for emergency relief purposes, the sum of three million dollars (\$3,000,000.00) from any moneys in the Treasury dedicated to the State Highway Department or the State Highway Fund, other than moneys derived from the proceeds of the sale of bonds; provided, however, that this appropriation shall not be construed as affecting any appropriation heretofore or hereafter made and any payments thereunder from highway funds for State aid to counties and municipalities.

2. This act shall take effect immediately.

Approved March 15, 1936.

.....

